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Supreme Court of the United States

OCTOBER TERM, 1969

No. 395

UNITED STATES OF AMERICA,
Petitioner,

versus

M. O. SECKINGER, JR., t/a M. O. SECKINGER CO.
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

A more fair statement of the question would be "Can the United States convert a general responsibility clause into one serving to indemnify?"

STATEMENT OF FACTS

The government's Statement of Facts is generally correct but borrows heavily from non-record matter. There is nothing in our record for example that tells how Bradham was burned, or how much electricity was in the exposed government wire, or whether he

was helping a fellow employee. Our record is clear, however, that there was governmental negligence sufficient for a Federal District Court to award Bradham $45,000.00 from the United States.

The fact statement goes on and attempts to lodge a transcript of the Bradham trial with this court. Whatever transcript lodged was not a part of the record in this case. We cannot pass on its correctness or official nature. Nor have we been served with any transcript to afford the opportunity to review same.

Certainly, if the court chooses to consider this transcript, it should ascertain the official character and consider the entire record.

Moreover, if what Seckinger has is official of the Bradham case (U. S. District Court, Eastern District, South Carolina; AC-183) it indicates on page 160 and following, that the accused foreman did not order Bradham to cross the line; but, in fact, told him not to do it. Whereafter, Bradham ignored the Seckinger foreman and crossed the line anyway, and hit the exposed wire.

These pages also reveal on page 35 that a government employee was present at the time of the injury, and denominated him as a safety inspector.

If Seckinger's pages are correct a reading of the entire record will immediately show why the United States was adjudged negligent.

REASONS FOR DENYING TH E WRIT

The government through able co nsel attempts to magnify the decision complained o and add to its importance. However, it only succe ds in attempting to torture the ordinary and commor lace meaning of a simple responsibility clause. It a cribes a wishful and far reaching interpretation to simple language.

Certainly, in these times where the ocus of this court is required on so many vital and i portant matters, time should not be taken with this ca e.

The alert Department of Justice as commendably pointed out the possible need for a hange in regula- tions. The denial of certiorari wo ld certainly give it the needed impetus to develop a new clause when indemnity is desired and intended.

The much maligned and magnifie ruling of the low- er court simply states that if you w nt someone to in- demnify for your negligence you mu t state this clearly and not disguise it. To require this urt to spend time restating this simple precept of law is both unfair and unwarranted.

Petitioner also presupposes that our U. S. District Courts are inadequate. Certainly, t se able trial judg- es would not grant judgment again the United States if, in fact, some other party wer the cause of the damages. Certainly, the District C urt in South Caro- lina would not have held the go rnment liable for

the payment of $45,000.00 if Seckinger were an obvious culprit or a proximate cause of the injury to Bradham.

Seckinger, of course, is unable to comment on the presence of 200 government indemnity suits. The government, it seems, is in a unique position to document their implication. Seckinger also is unable to comment on the potential liability of Thirty Million Dollars involved in these suits. However, he is informed that if, in order to work on a government project, indemnity for the government's negligence is required, the cost to the government would certainly be greater than Thirty Million dollars in any one year. Any contractor in his right mind would have to add considerable to his bid price in order to cover this practically unlimited liability. At the very least one would tend to offset the other.

The government would be better advised to handle its own negligence and spend the money saved to institute the proper safety precautions which could serve as a model for all industry.

Following the lower court's ruling certainly would not deprive the responsibility clause of any substantial effect. It would continue to be utilized to make the contractor responsible for his own negligence, both in the performance of the contract, the quality of his work, the ability to respond to a judgment, and the other anticipated facets of general and whole responsibility.

The only effect stricken by the Fifth Circuit is a wishful claim of indemnity. The lower court's reading of the clause does not deny it of practical meaning, but merely recognizes its practical meaning.

The application for certiorari indicates that the government does not necessarily want full indemnity, but might be happy with partial indemnity.

This appears to be an afterthought since the original petition asked for payment in the amount of $45,066.20, the full amount awarded Bradham. (R. 7). This record shows that the government never asked for twenty per cent or forty per cent, but always one hundred per cent of its damages.

At this late date the government changes its course and states that it "seeks only to enforce the specific agreement in the contract."

The specific agreement said nothing to the effect that Seckinger would pay the government for all or a part of the government's negligence.

Petitioner's criticism of Workmen's Compensation laws would certainly come as a surprise to those early sponsors of such laws. These laws recognize the inadequacy of the negligence laws and set forth an award for injury. They are not merely an insulation, but a well deserved protection for the worker and his family. Naturally, they do not allow double recovery.

The assumption also that Seckinger was in such a good position to control the government's negligence also is fallacious. A visit to any government installation or base will dispel the theory that a sub-contractor can tell the governmental agency how to control the specific area in which he must operate. The opposite appears to be true and that is the contractor must assume the risk and work under the prescribed conditions on government installations.

How else could the base perform its function?

Moreover, if the Workmen's Compensation laws unfairly insulate a contractor, this can be countered by a clear indemnity clause in any one of the popular methods.

The government attaches improper meaning to the Jacksonville Terminal case. See *Jacksonville Terminal Company v. Railway Express Agency, Inc.*, 296 Fed. 2d 256 (CCA 5, 1962). The so-called indemnity clause in that case used the words "fully indemnify" and "save harmless," clearly words of indemnity intent. It contained a real indemnity clause and not a puny responsibility clause. Moreover, the contract called for a complete taking over of the terminal property. It was not merely to go onto the property to fix the plumbing.

The foregoing merely supplements and reinforces the excellent decision of the Fifth Circuit. The decision stands well on its own bottom.

This unanimous opinion is certainly valid and sound. Most of petitioner's argument for certiorari at this point is a reiteration of that offered and considered in the lower court. The decision gave careful consideration to the cause involved, and applied Federal law. It overturned one line of reasoning in the District Court, but continued to give stress to the clear meaning of the responsibility clause. It correctly applied the majority rule to the simple language of the simple responsibility clause. It considered squarely the fact that the government wanted all of their damages from the contractor, Seckinger. It correctly decided the case.

So, the certiorari should be denied. The lower court gave a fair construction to plain language. It recognizes that the government could easily have been indemnified if it wanted to. All it had to do was write in an indemnity clause, either partial or total.

In this light, it seems important, in these times, that our body of law must adhere to basic standards that allow citizens to assess risk based on plain language. Such is necessary for our economy. How else can a man bid on a job intelligently and profitably?

Here, Seckinger is a small businessman. Some say he is the backbone of this country. He works hard, stays up nights and puts in his bid. He bids on the basis of the clear intention of the clause.

He seems abundantly entitled to protection. How can the government come before this tribunal some thir-

teen years after the performance of its contract and try to make a sleeper out of this clause?

The lower court has put it in its proper perspective and interpreted it as meaning exactly what it says.

The government, despite its vast and skillful legal apparatus, can only get what it paid for.

If it desires to be indemnified for its own negligence, either wholly or partially, why can't it write this plainly in the contract? Certainly, they have splendid draftsmen available. Certainly, they can exclude any risk they desire to exclude.

There are countless ways to write a pure indemnity agreement. "Hold harmless", "indemnify the United States from any and all losses", including the second party's own negligence, or that of its agent", are just a few of the many.

Whatever the reason might be, the government did not in the contract with Seckinger state that Seckinger should be responsible for the government's negligence and indemnify it therefor. Having failed to do so, they cannot create the intention in the contract by their vast legal apparatus and unlimited fiscal resources.

If petitioner had put a real indemnity clause in initially, Seckinger could have handled the job differently. He would have had to bid higher. He might have provided additional employees to make sure that the gov-

ernment's negligence was caught before it did any damage.

Look again at the language.

What does "responsible" mean anyway?

The 6th Circuit states that to be responsible is to be answerable to the discharge of a duty or obligation. Responsibility includes judgment, skill, ability, capacity and integrity, and is implied by power. *Ohio Power Company, v. N. L. R. B.*, 176 Fed. 2d 385, 387 (CCA 6, 1949).

A Virginia court states that responsible means legally answerable or accountable for discharge of the duty. *Manassas Park Development Co. v. Offutt*, 203 Va. 382, 124 S. E. 2d. 29 (1962).

A Circuit Court has held that the word responsible is far from being broad enough to make the party, that has agreed to be responsible, actually an insuror against all possible contingencies. It was used to mark. the time when the liability should commence. *Fairmont Coal Co. v. Jones & Adams Co.*, 134 Fed. 711, 714 (CCA 7, 1905).

The American College Dictionary states responsible is "answerable or accountable, as for something within one's power, control, or management. Involving accountability or responsibility: a responsible position. Chargeable with being the author, cause or occasion of something. Having a capacity for moral decisions

and therefore accountable; capable of rational thought or action. Able to discharge obligations or pay debts. Reliable in business or other dealings; showing reliability."

Then what could the government and Seckinger have meant by "responsible" in their contract?

Remember, that the government wrote the contract and it must be construed most strongly against them. *Martin v. American Optical*, 184 Fed. 2d. 528 (CCA 5, 1950); See annotation 175 ALR 18, Sec. 8.

What does this construction give us?

Can anyone seriously urge that when Seckinger was signing up his plumbing contract and agreed to be "responsible for all damages to persons or property . . . etc." he meant to take care of whatever the government might be held liable for or even a portion thereof.

"Shall be responsible" is certainly a far cry from "shall indemnify and hold harmless".

How can petitioner be offering a fair interpretation of the language used?

Still another viewpoint sheds light.

The clause deals with damage to "persons".

Did the petitioner pay the $45,000.00 to a "person" under the contract?

Was Bradham such a person as to be covered by the indemnity clause?

We think not.

Bradham was an employe of Seckinger.

He was dealt with amply and liberally under workmen compensation provisions of the contract. Isn't it a strained construction to say that this applied to an employe also?

Why would he be dealt with in one section so liberally and again dealt with in another section?

How could the parties have intended this?

To further back off and take a long commonsense look at the government's position, we profit from a genuinely objective view.

The government, in effect, is saying that the United States District Court for the Eastern District of South Carolina entered a judgment. No appeal was taken. It now says that the judgment was actually entered against the wrong party since Seckinger was the real culprit.

They say that the real negligent party was Seckinger, yet they stood idly by when the distinguished District Court Judge of South Carolina said they were all wrong. The government naturally had competent defensive trial counsel, who would seize upon the negligence of

another as a real impressive defense. Yet the District Court was unconvinced and awarded a judgment against the government alone for $45,000.00.

If Seckinger was as negligent as the government now says it is, why did they get stuck for all of it?

The controlling negligence of another is an absolute defense.

How can the government stand idly by when such an injustice is done, let it be done, and then many years later attempt to get Seckinger to share the blame by virtue of a narrow contract and possible implications therefrom?

Isn't petitioner actually saying that although they were adjudged negligent, they really were not? Aren't they trying to go behind the judgment of the South Carolina District Court?

If we had been so negligent why not use our negligence as a defense? Why now argue that Seckinger was the real party negligent? Remember, Seckinger had to be negligent to have breached its alleged agreement with the government.

Certainly, the Judge of the District Court in South Carolina would not have awarded $45,000.00 to Bradham if a valid escape had been offered.

Under the Federal Tort Claim Act, United States of America is liable just like a private person would be.

Arnhold v. U. S., 284 Fed. 2d. 326 (CCA 9, 1960) Cert. den. 82 Sup. Ct. 122, 368 U. S. 876, 7 L.Ed 2d 76.

A private person in South Carolina is not liable for someone else's tort. *Tobias v. Carolina Power Co.*, 190 S. C. 181, 2 S.E. 2d. 686. (1939)

Therefore, if we had been so negligent (negligent enough to have breached our contract), the petitioner would have a wonderful defense to the claim of Bradham.

Yet no such defense was apparently offered.

Who ever heard of able government counsel letting a judgment be rendered against the United States when it was actually the tort of an independent contractor.

This is a real knockout punch as a defense.

We have naturally refrained from going too deeply into background law. However, it should be noted that an excellent statement of the condition of the law of indemnity as of 1947 can be found in Annotation in 175 ALR on page 12. The court goes into the matter very deeply and thoroughly.

Also see Vol. 1, *The Forum*, American Bar Negligence Section pub. p. 1 - 30. for a 1965 review of the law.

Also a current analysis of the law of indemnity can be found in 42 CJS, Indemnity Sec. 1 et seq., p. 563

et seq. and in 27 Am. Jur Indemnity Sec. 1 et seq. p. 455.

The government tries another approach and asks for certiorari because the Ryan doctrine was not applied.

Count II. of the government's original petition states that: "12. That having undertaken to perform the contract for the United States of America, the defendant, his agents, servants, and employees were obligated to perform the work properly and safely, and to provide workmanlike service in the performance of said work." (R. 7).

It attempts to show that Seckinger somehow promised to keep the United States Marine Base at Parris Island, S. C. in a seaworthy condition.

Such could not be further from the truth of the matter.

Seckinger was not a stevedore, who of necessity takes over the operation of a ship's loading and seaworthiness. He was merely a sub-contractor going in to do some work on the steam pipes. The government does not say we did our plumbing work improperly. It is not complaining that one of the steam pipes broke. It does not complain that one of our valves exploded. It only complains that one of our employees was injured by its own negligence while performing this work.

Thus, petitioner is not complaining that we breached

the core of our agreement, or that we did not perform our plumbing work properly, but they are going several steps further and saying that in the performance of our agreement we committed a tort by using an employe, and exposing him to the government's negligence; or in the alternative we did not insulate our employee from the government's negligence.

They not only want Seckinger to warrant his plumbing work, but the government wants Seckinger to insure any injury to Seckinger's employee because of the negligence of the government. And this by implication based on a weak responsibility clause.

It goes without saying that if the government were allowed to prevail in this case, they would prevail in almost any case where an employee of a government contractor was injured on government property even where our employee was run over by a negligent government truck while the truck was driving on the job, or even possibly when a negligent Marine misdirected a grenade.

The Ryan doctrine states at its core that the obligation is not a quasi-contractual obligation implied in law, or arising out of a non-contractual relationship. It is of the essence of petitioner's stevedoring contract. It is petitioner's warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product.

Thus, if the government were complaining of defective plumbing work, it might well attempt to apply

the Ryan doctrine. However, they make no complaint of the quality of our plumbing work, but merely say that we fail to insulate our employee from the government's own negligence.

This view would certainly strain the Ryan doctrine beyond its normal implication.

The Ryan agreement was a broad contract and encompassed many things including loading and unloading. It was a contract of general seaworthiness. In our case we only did a little plumbing job on a big government base. In short, our contract was not as broad and all-encompassing as the stevedoring contract, but much more narrow and restricted.

A recent Supreme Court expression of the Ryan doctine appears in *Italia Societa v. Oregon Stevedoring Co.*, 376 U. S. 315, 84 Sup. Ct. 748, 11 L. Ed. 2d 732 (1964).

This again was another stevedoring case. The court held: . . ."the stevedore's obligation to perform with reasonable safety extends not only to the stowage and handling of cargo but also to the use of equipment incidental thereto... including defective equipment supplied by the shipowner...and that the shipowner's negligence is not fatal to recovery against the stevedore."

Even here, the case was limited by an excellent dissenting opinion by Mr. Justice Black, who sounds a warning and states in part: ". . . the Court here

expands the general law of warranty in a way which I fear will cause us regret in future cases in other areas of the law as well as in admiralty. There is no basis in past decisions of this or any other court for the holding that one who undertakes to do a job for another and is not negligent in any respect nevertheless has an insurer's absolute liability to indemnify for liability to insured workers which the party who hired the job done may incur."

Here again our distinction would apply.

We are not dealing with an all-encompassing service contract which agreed to furnish all plumbing for the government installation on which the work was done. We are dealing only with a narrow contract to install a relatively small amount of outside plumbing in accordance with certain plans and specifications.

Certainly, any service contract such as the contract of a stevedoring firm implies many obligations far beyond that of a plumber doing a specified job.

The stevedore takes over the ship and its ingredients of seaworthiness for a time.

The plumber, Seckinger, hardly had command of the petitioner's Parris Island Marine Depot for even a short time.

What if they had tried to take over even the electrical system of petitioner? Seckinger would have probably been thrown in the brig.

What could be more important to a ship to have the cargo continue its seaworthiness? Improper loading will cause improper ballast, and untold risk.

This is why stevedoring is so expensive. You pay the price to have your cargo loaded right so you won't turn over or break up in the middle of the ocean.

However, such a conclusion could not be applied to our situation.

Yet the Government seizes an old stevedoring case and attempts to apply it. *American Stevedores v. Porello,* 67 Sup. Ct. 847, 330 U. S. 446, 91 L.Ed. 1011 (1947).

In considering Porello, it should be remembered that this was another general stevedoring contract. As a stevedore, American was responsible for the general seaworthiness of the ship. American did not go on to fix the plumbing, but went on to take over the general loading and seaworthiness of the vessel.

Moreover, the wording of the contract was much more general, and was considered by an admiralty court. Such is not anywhere nearly present in our case.

Next, Porello was decided well prior to the Ryan case, and should be read in the light thereof. The case was a libel in admiralty which has different features. For one example, Admiralty basically allows contribution between joint tort feasors as a substantive matter.

Further, the specific clause itself, supposedly one

of indemnity, was much broader than our clause and the Court was faced with a lower court determination that both stevedore and the United States were negligent.

We, therefore, feel that Porello is clearly distinguishable. Moreover, it is hardly a case which encourages the grant of certiorari here.

CONCLUSION

For all of the foregoing reasons, this petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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AFFIDAVIT

Service of the foregoing Brief has been made as required by depositing sufficient copies thereof, properly stamped for air mail postage, and properly addressed to opposing counsel of record.

This ____ day of August, 1969.

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